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7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE DISTRICT OF ARIZONA**
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10 Benjamin Anthony Altamirano, Jr.,
11 Plaintiff,
12 v.
13 City of Tucson, et al.,
14 Defendant.

1 No. CV-15-00169-TUC-RM

2 **ORDER**
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5 Pending before the Court is Plaintiff's Motion for Reconsideration of the Court's
6 February 26, 2021 Order Regarding Admissibility of Witnesses. (Doc. 237.) Defendants
7 filed a response. (Doc. 240.) The Motion for Reconsideration will be granted.
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9 **I. Plaintiff's Motion for Reconsideration**
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11 On February 26, 2021, the Court issued an Order regarding the admissibility of
12 Plaintiff's witnesses. (Doc. 236.) In relevant part, the Order precluded the testimony of
13 Doctors Barrillas, Barreau, and Maldonado ("the doctors"), finding that the doctors had
14 not been properly disclosed as expert witnesses. (*Id.* at 12-14.) Specifically, the Court
15 found that because the doctors were not treating physicians, they were not subject to an
16 exemption from the Rule 26(a)(2)(B) written report requirement. (*Id.* at 14.) The Court
17 found that "there is no indication that [the doctors] were involved in Plaintiff's treatment
18 so as to subject them to the 'treating physician' exception to Rule 26(a)(2)" and that
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1 because they were not properly disclosed as expert witnesses, their testimony would be
2 excluded.

3 Plaintiff argues that the Court should reconsider its exclusion of the doctors'
4 testimony. (Doc. 237.) Plaintiff argues that he disclosed Dr. Barillas as a witness on
5 October 16, 2017, and that on December 21, 2017, the City of Tucson itself disclosed Dr.
6 Barillas' report containing information regarding the level of Plaintiff's cognition and
7 intelligence in 2011. (*See id.* at 2, 4; Doc. 237-1 at 8; Doc. 237-2 at 5; Doc. 237-3 5-8.)
8 Plaintiff argues that the parties' disclosures satisfy Rule 26(a)(2)(B), and he also argues
9 that Dr. Barillas has not been retained as an expert witness but rather is a fact witness
10 disclosed to testify regarding his interactions with Plaintiff. (Doc. 237 at 4.) Plaintiff
11 further argues that Drs. Barteau and Maldonado are not offered as experts but only as fact
12 witnesses who gathered raw data from questionnaires they administered to Plaintiff;
13 expert witness Dr. Simpson then interpreted the raw data. (Doc. 237 at 2-4.)

14 Defendants oppose the Motion for Reconsideration, arguing that the Court's Order
15 correctly determined that the doctors are undisclosed expert witnesses, and that Plaintiff
16 cannot satisfy the standard for a motion for reconsideration because he has not shown
17 manifest error and has not raised any new facts or law that he could not have presented
18 earlier. (Doc. 240.) Defendants argue that Dr. Barrillas was originally retained by
19 Plaintiff's former lawyer for anticipated testimony in Plaintiff's criminal case, and that
20 Plaintiff cannot transform him from an expert witness in the previous matter to a treating
21 physician in this matter "merely by the passage of time." (*Id.* at 4.) Defendants further
22 argue that Dr. Barrillas' "preliminary report" does not satisfy the written report
23 requirement of Rule 26(a)(2)(B) because it omits multiple pieces of required information.
24 (*Id.*)

25 Defendants argue that Drs. Barteau and Maldonado are expert witnesses to the
26 extent they will testify regarding the tests they performed and their observations. (*Id.*)
27 Defendants further argue that to the extent Drs. Barteau and Maldonado are "mere
28 vehicles of information" contained in Dr. Simpson's report, their testimony is cumulative

1 of Dr. Simpson's and a waste of time and should therefore be precluded under Federal
2 Rule of Evidence 403. (*Id.* at 4-5.) Defendants also argue that the testimony of Drs.
3 Barteau and Maldonado is irrelevant because it does not make any fact in controversy
4 more or less probable. (*Id.* at 5.) Finally, Defendants argue that designating Drs. Barteau
5 and Maldonado as fact witnesses would circumvent Rule 703, which requires a separate
6 analysis for disclosing underlying facts and data of an expert opinion. (*Id.*)

7 **II. Standard of Review**

8 LRCiv 7.2(g) sets forth the standard under which a Court reviews a Motion for
9 Reconsideration:

10 The Court will ordinarily deny a motion for reconsideration
11 of an Order absent a showing of manifest error or a showing
12 of new facts or legal authority that could not have been
13 brought to its attention earlier with reasonable diligence. Any
14 such motion shall point out with specificity the matters that
15 the movant believes were overlooked or misapprehended by
16 the Court, any new matters being brought to the Court's
17 attention for the first time and the reasons they were not
18 presented earlier, and any specific modifications being sought
19 in the Court's Order. No motion for reconsideration of an
Order may repeat any oral or written argument made by the
movant in support of or in opposition to the motion that
resulted in the Order. Failure to comply with this subsection
may be grounds for denial of the motion.

20 In the District of Arizona, motions for reconsideration will be granted when:

- 21 (1) There are material differences in fact or law from that
22 presented to the Court and, at the time of the Court's decision,
the party moving for reconsideration could not have known of
the factual or legal differences through reasonable diligence;
23 (2) There are new material facts that happened after the
Court's decision;
24 (3) There has been a change in the law that was decided or
enacted after the Court's decision; or
25 (4) The movant makes a convincing showing that the Court
failed to consider material facts that were presented to the
Court before the Court's decision.

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28 *Motorola, Inc. v. J.B. Rodgers Mech. Contractors*, 215 F.R.D. 581, 586 (D. Ariz. 2003).

1 “Reconsideration is indicated in the face of the existence of new evidence, an intervening
2 change in the law, or as necessary to prevent manifest injustice.” *Navajo Nation v.*
3 *Confederated Tribes & Bands of the Yakama Indian Nation*, 331 F.3d 1041, 1046 (9th
4 Cir. 2003). Whether to grant reconsideration is within the sound discretion of the trial
5 court. *Id.* A denial of a motion for reconsideration is reviewed for abuse of discretion.
6 *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 883 (9th Cir. 2000).

7 **II. Analysis**

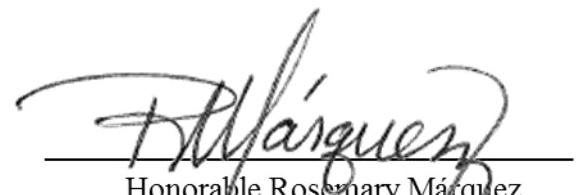
8 The Court finds good cause to grant Plaintiff’s Motion for Reconsideration. The
9 Court finds that Plaintiff has complied with the standard set forth in LRCiv 7.2(g) by
10 showing manifest error in the Court’s previous Order excluding the doctors’ testimony.
11 Specifically, the Court finds that Dr. Barillas was properly disclosed by both parties as a
12 fact witness and will admit his testimony on that basis. The Court further finds that Drs.
13 Barteau and Maldonado were also properly disclosed as fact witnesses and will admit
14 their testimony on that basis. The Court further finds that the doctors’ testimony is
15 relevant pursuant to Fed. R. Evid 401 and that its relevance is not outweighed by any
16 countervailing Rule 403 concerns. The Court finds that the doctors’ testimony is likely to
17 assist the jury in its understanding of Dr. Simpson’s testimony and is not unduly
18 prejudicial, cumulative, or a waste of time.

19 Accordingly,

20 **IT IS ORDERED** that Plaintiff’s Motion for Reconsideration (Doc. 237) is
21 granted. The testimony of Doctors Barrillas, Barteau, and Maldonado is **admissible**.

22 Dated this 9th day of April, 2021.

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Honorable Rosemary Marquez
United States District Judge